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ATTN: ALL US COURTS [COURT CLERKS] CLERK U.S. DISTRICT COURT  
 OSC THE HONORABLE [JUDGE'S BALMER] WESTERN DISTRICT OF WASHINGTON  
 USSC THE HONORABLE [JUDGE ROBERTS]  
 FLSD THE HONORABLE [JUDGE'S KING]  
 WAWD THE HONORABLE [JUDGE'S ROBERT]  
 MULT4D THE HONORABLE [JUDGE'S WALLER]  
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Case 3:11-mc-09267 As of 08/12/2012 7:28 PM PDT Page 1 of 9 Page ID#: &lt;pageID&gt;

U.S. District Court State Federal ( En Banc ( MODEL PROTOCOL - 1 ) )  
 ORP ( Multnomah (4)), FLSD ( Miami (1)), WAWD ( Seattle (2)), ORD ( Portland (3))

CASES NO.WAWD 2:10-cv-00198 & 2:12-cv-01282 MULT4D 930201117 FLSD 1:09-md-1298  
 02036 MULT4D 930195088 ORD 3:11-mc-09267 ORP 3:93-cv-00288 & 3:92-cv-01562 aoc

Brian L. Morgan, Specialist US ARMY RA Counsel  
 Plaintiff & Counter Claims & Defendant & AOSS

v.

In Re: Checking Account Overdraft Litigation, (AOSS)  
 I/R: Arthur v. SLM Corp. ( Morgan v. Sallie Mae, (CEC))  
 Morgan v. Mueller, Katz, Khan, Frye, ( Olson, (Campbell))  
 Morgan v. Harden, Fred Meyer, K, K & R, & ( Kroger )  
 Morgan v. Subway Inc. 39099 ( Fresh & Healthy Inc.)  
 Defendants & AOSS

MODEL PROTOCOL FOR  
 DISCOVERY OF  
 ELECTRONICALLY STORED  
 INFORMATION IN CIVIL  
 LITIGATION

## I INTRODUCTION

*Experience increasingly demonstrates that discovery of electronically stored information ("ESI") poses challenges for litigants (both parties and their attorneys) and for courts beyond the issues typically encountered and addressed when dealing with discovery of traditional, hard-copy documents. The United States District Court for the Western District of Washington recognizes that ESI is now frequently the subject of discovery and that such discovery can be extremely burdensome, time-consuming, and expensive. The Court believes that establishing a framework for anticipating and addressing ESI-related discovery at the earliest stages of litigation will encourage mutual and cost-effective solutions and speedier and more informed resolution of disputes.*

*In furtherance of these goals, the Court has developed this Model Protocol as a framework that may be used by parties for addressing and resolving a wide range of ESI issues. The Protocol is not intended to be an inflexible checklist. It may be adopted in its*

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entirety by the parties without any changes, or it may be adapted, as appropriate. Not all aspects of the Protocol may be applicable or practical for a particular matter, and if the parties do not intend to seek discovery of ESI, it may not be applicable to a particular case. The Court expects that the parties will consider the nature of the claim, the amount in controversy, agreements of the parties, the relative ability of the parties to conduct discovery of ESI, and such other factors as may be relevant under the circumstances in deciding on adopting and/or tailoring the provisions of the Protocol. The Court encourages the parties to use this Protocol in cases in which there will be discovery of ESI and to resolve ESI issues informally, early, and without Court supervision whenever possible.

Part II below sets forth the basic provisions of the Model ESI Protocol which the Court expects would apply in most cases involving ESI discovery. Part III sets forth provisions that provide an additional level of detail for the parties that may be appropriate and useful in addressing more complicated ESI discovery issues. The complexity of ESI discovery varies from case to case, and is not necessarily tied to the number or size of the parties or the amount in controversy. The additional provisions of Part III are designed to assist parties in anticipating and addressing early-on more complicated ESI discovery issues. In other cases, however, the parties may determine that they do not need the level of specificity of the Part III provisions and may not use them entirely. The intent is to provide the parties with suggested provisions from which the parties can pick and choose, taking into consideration the factors listed above as may be relevant under the circumstances of the particular case.

## II. MODEL PROTOCOL FOR ESI DISCOVERY

### A. General Principles:

1. An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

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2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

**B. Standard for ESI Disclosures:**

Within 30 days after the Rule 26(f) conference, or at a later time if agreed to by the parties, each party shall disclose:

1. Custodians. The custodians most likely to have discoverable ESI in their possession, custody or control. The custodians shall be identified by name, title, connection to the instant litigation, and the type of the information under his/her control.

2. Non-custodial data sources. A list of non-custodial data sources (e.g. shared drives, servers, etc.), if any, likely to contain discoverable ESI.

3. Third Party Data Sources. A list of third party data sources, if any, likely to contain discoverable ESI (e.g. third party email and/or mobile device providers, "cloud" storage, etc.) and for each such source, indicate the extent to which a party is (or is not) able to preserve information stored in the third party data source.

4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(C)(i). Note: Section C(2)(a)-(i) below sets forth data sources and ESI which are not required to be preserved by the parties. Those data sources and ESI do not need to be included on this list.

**C. Standard for Preservation of ESI:**

A party has a common law obligation to take reasonable and proportional steps to preserve discoverable information in the party's possession, custody or control. With respect to ESI, the following provisions apply:

1. Absent a showing of good cause by the requesting party, the parties shall not be

1 required to modify, on a going-forward basis, the procedures used by them in the ordinary  
 2 course of business to back up and archive data; provided, however, that the parties shall  
 3 preserve all discoverable ESI in their possession, custody or control. All parties shall  
 4 supplement their disclosures in accordance with Rule 26(e) with discoverable ESI responsive  
 5 to a particular discovery request or mandatory disclosure where that data is created after a  
 6 disclosure or response is made (unless excluded under (C)(2) or (D)(1)-(2) below).

7 2. Absent a showing of good cause by the requesting party, the following  
 8 categories of ESI need not be preserved:

- 9 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 10 b. Random access memory (RAM), temporary files, or other ephemeral  
 11 data that are difficult to preserve without disabling the operating system.
- 12 c. On-line access data such as temporary internet files, history, cache,  
 13 cookies, and the like.
- 14 d. Data in metadata fields that are frequently updated automatically, such as  
 15 last-opened dates (see also Section (E)(5)).
- 16 e. Back-up data that are substantially duplicative of data that are more  
 17 accessible elsewhere.
- 18 f. Server, system or network logs.
- 19 g. Data remaining from systems no longer in use that is unintelligible on  
 20 the systems in use.
- 21 h. Electronic data (e.g. email, calendars, contact data, notes, and text  
 22 messages) sent to or from mobile devices (e.g., iPhone, iPad, Android,  
 23 and Blackberry devices), *provided* that a copy of all such electronic data  
 24 is routinely saved elsewhere (such as on a server, laptop, desktop  
 25 computer, or "cloud" storage).

26 3. The parties are to confer on any other categories of ESI that may not need to be  
 27 preserved, in light of the General Principles set forth above, and determine whether the parties  
 can agree that such categories can be added to the non-preservation list in (C)(2) above.

**D. Standard for Addressing Privilege:**

The parties are to confer on the nature and scope of privilege logs for the case,  
 including whether categories of information may be excluded from any logging requirements

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1 and whether alternatives to document-by-document logs can be exchanged.

2 1. With respect to privileged or attorney work product information generated after  
3 the filing of the complaint, parties are not required to include any such information in privilege  
4 logs.

5 2. Activities undertaken in compliance with the duty to preserve information are  
6 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

7 3. Parties shall confer on an appropriate non-waiver order under Fed. R. Evid. 502.  
8 Until a non-waiver order is entered, information that contains privileged matter or attorney  
9 work product shall be immediately returned to the producing party (i) if such information  
10 appears on its face that it may have been inadvertently produced or (ii) if the producing party  
11 provides notice within 15 days of discovery by the producing party of the inadvertent  
12 production.

13 **E. Other ESI Discovery Protocols:**

14 1. On-site inspection of electronic media. Such an inspection shall not be  
15 permitted absent a demonstration by the requesting party of specific need and good cause or by  
16 agreement of the parties.

17 2. Search methodology. The Court presumes that in the majority of cases, the use  
18 of search terms will be reasonably necessary to located ESI likely to contain discoverable  
19 information. Parties shall try to reach agreement on appropriate search terms before any query  
20 is performed.

21 a. A producing party shall disclose what search terms, if any, were used to  
22 locate ESI likely to contain discoverable information. If search terms were not used, a party  
23 shall disclose the search methodology used to locate ESI likely to contain discoverable  
24 information.

25 b. If search terms were used to locate ESI likely to contain discoverable  
26 information, a requesting party is entitled to no more than 5 additional terms or queries to be  
27 used in connection with further electronic searches absent a showing of good cause or  
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1 agreement of the parties. The parties shall confer in good faith on the 5 additional terms or  
 2 queries. Focused terms and queries, rather than overbroad ones (e.g., product and company  
 3 names), shall be employed.

4 c. For the purposes of this Protocol, and absent a showing of good cause,  
 5 search terms returning more than 250 megabytes of data are presumed to be overbroad. The  
 6 producing party shall search non-custodial data sources, emails, and other ESI maintained by  
 7 the custodians identified above.

8 3. Format. The parties shall confer and agree on the format in which they produce  
 9 ESI and non-ESI. It is presumed that ESI shall be produced to the requesting party with  
 10 searchable text, in a format to be decided between the parties (e.g., TIFF with a companion text  
 11 file).

12 4. Native files. Unless otherwise agreed to by the parties, the only files that should  
 13 be produced in native format are files not easily converted to image format, such as Excel,  
 14 Access files, and drawing files.

15 5. Metadata fields. The parties shall confer and agree on whether metadata is to be  
 16 produced and if so, what metadata will be produced, or whether metadata shall be excluded  
 17 from discovery.

18 6. Costs. Generally, the costs of discovery shall be borne by each party. The  
 19 Court will, however, apportion the costs of discovery among the parties, including discovery of  
 20 ESI that is not reasonably accessible, upon a showing of unequal burdens, unreasonable  
 21 requests, or other good cause.

### 22 **III. ADDITIONAL SUGGESTED PROVISIONS FOR ESI DISCOVERY**

23 *[As discussed in the introduction above, the following are suggested provisions that*  
 24 *provide an additional level of detail for parties that may be of assistance in cases either with*  
 25 *more complicated ESI discovery or where the parties believe that an additional level of*  
 26 *specificity would be beneficial to resolving or avoiding ESI discovery issues. The parties may*  
 27 *pick and choose any provisions they find useful, and cut and paste them into the ESI protocol*

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1 above as appropriate.]

2 1. Search methodology.

3 Upon reasonable request and if appropriate for the particular case, a party  
4 shall also disclose information relating to network design, the types of databases, database  
5 dictionaries, the access control list and security access logs and rights of individuals to access  
6 the system and specific files and applications, the ESI document retention policy,  
7 organizational chart for information systems personnel, or the backup and systems recovery  
8 routines, including, but not limited to, tape rotation and destruction/overwrite policy.

9 2. Format.

10 a. Each document image file shall be named with a unique Bates Number  
11 (e.g. the unique Bates Number of the page of the document in question, followed by the  
12 extension "TIF" or "PDF"). File names should not be more than twenty characters long or  
13 contain spaces. When a text-searchable image file is produced, the producing party must  
14 preserve the integrity of the underlying ESI, i.e., the original formatting, the metadata (as noted  
15 below) and, where applicable, the revision history. The parties shall produce their information  
16 in the following format: single page images and associated multi-page text files containing  
17 extracted text or with appropriate software load files containing all requisite information for  
18 use with the document management system (e.g., Concordance® or Summation®), as agreed  
19 to by the parties.

20 b. If appropriate to the particular case, the parties shall consider whether  
21 or not the full text of each electronic document shall be extracted ("Extracted Text") and  
22 produced in a text file. If the parties so agree, the Extracted Text shall be provided in  
23 searchable ASCII text format (or Unicode text format if the text is in a foreign language) and  
24 shall be named with a unique Bates Number (e.g. the unique Bates Number of the first page of  
25 the corresponding TIFF or PDF document followed by the extension ".txt" or ".pdf").

26 c. If a document is more than one page, the unitization of the document and  
27 any attachments and/or affixed notes shall be maintained as they existed in the original  
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1 document.

2 3. Metadata fields. The parties are to confer and agree on whether metadata is to  
3 be produced or may be excluded from discovery. Meta-Data may not be relevant to the issues  
4 presented or, if relevant, not be reasonably subject to discovery given the Rule 26(b)(2)(C)  
5 cost-benefit factors. Therefore, it may be subject to cost-shifting under Fed.R.Civ.P.  
6 26(b)(2)(C). For example, if one party is producing only paper documents, and the other party  
7 is producing ESI, the parties should confer on whether the additional cost and burden of  
8 producing metadata by the party producing ESI is reasonable or should be shifted under the  
9 facts and circumstances of the case. If the parties agree to produce metadata, and unless other  
10 agreed, each party shall produce the following metadata associated with ESI to the extent  
11 reasonably accessible: (a) the author(s) of the ESI; (b) the recipient(s) of the ESI; (c) the date  
12 the ESI was created; and (d) the source from which the ESI was produced. The "source" of  
13 ESI shall be the name of the person who was the custodian of the ESI or, if the name of a  
14 person is not available, the storage location (e.g., "Regulatory Shared Drive-Wayne, PA").  
15 This information will be included in the "Author," "Recipient," "Date," and "Source" fields  
16 (respectively) for each document in the Concordance or Summation load file associated with  
17 the TIF images. Although it is presumed generally that the above list of metadata fields will be  
18 provided, the list of metadata fields is intended to be flexible and may be changed by agreement  
19 of the parties, particularly in light of advances and changes in technology, vendor and business  
20 practices.

21 4. Hard Copy Documents. If the parties elect to produce hard copy documents in  
22 an electronic format, the production of hard copy documents shall include a cross-reference  
23 file that indicates document breaks and sets forth the Custodian or Source associated with each  
24 produced document. Hard copy documents shall be scanned using Optical Character  
25 Recognition technology and searchable ASCII text files shall be produced (or Unicode text  
26 format if the text is in a foreign language). Each file shall be named with a unique Bates  
27 Number (e.g. the Unique Bates Number of the first page of the corresponding TIFF or PDF

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document followed by the extension ".txt" or ".pdf").

DATED: \_\_\_\_\_

PARTY 1

PARTY 2

By \_\_\_\_\_

By \_\_\_\_\_

**ORDER**

Based on the foregoing, IT IS SO ORDERED.

DATED: \_\_\_\_\_

\_\_\_\_\_  
The Honorable  
United States District Court Judge

DATED: \_\_\_\_\_

\_\_\_\_\_  
The Honorable  
US State of Oregon 4<sup>th</sup> District Court Judge

Plaintiffs Represented By

"s/" Brian L. Morgan *Brian L. Morgan* DATED: 08-13-2012

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